

SHANDO THERON

# FAMILY

## I am a father who wants custody of my children

IF YOU HAVE A CHILD or children with someone, whether you were never married or are divorced matters not. What matters is that you believe you can provide a better home for your child, one of stability, consistency, love, nurturing, and the opportunity for your child to grow and develop as a person.

You want your children to live with you.

### WHAT LAW AND ACTS ARE APPLICABLE?

There are a number of Acts involved. The most important, however, is the Children's Act, 38 of 2005. These are the relevant sections:

- **Sec 21: Parental Responsibilities and Rights of Unmarried Fathers:**  
You acquire full (equal) parental responsibilities and rights in respect of a child if:
  - (1) At the time of the child's birth, you were living with the mother in a permanent relationship;
  - (2) If you were not living with the mother, but –
    - (i) You are or consent to be identified as the child's father or, in terms of customary law, paid damages;
    - (ii) Contribute or have attempted to contribute to the children's upbringing; or
    - (iii) Contribute or have attempted to contribute to the children's maintenance.
- **Sec 20: Parental Responsibilities and Rights of Married Fathers:**  
You have full (equal) parental



- responsibilities and rights in respect of a child if:
- (1) You are married to the child's mother; or
  - (2) You were married to her at the time of the child's conception, birth, or time between conception and birth.
- **Sec 33: Contents of Parenting Plans:**  
This is the document, to be

made an order of court (either by consent or through litigation), that regulates:

- (1) Where and with whom the child lives;
- (2) Maintenance payable and by whom;
- (3) Contact between the child and the parties, and other parties such as grandparents; and

(4) Schooling and religious upbringing of the child.

### CAN A FATHER GET CUSTODY OF HIS CHILDREN IN PREFERENCE TO THE MOTHER?

With a competent lawyer, yes he can. *Van der Linde v Van der Linde* is a 1996 case in which the court stated that the quality of the parental role is not determined by gender, and the concept of "mothering" is as much a component of a man's being as a woman's.

### WHAT IS THE PROCESS, IN BROAD STROKES?

1. Your specialist attorney draws up a parenting plan in accordance with your instructions;
2. It is presented to the mother of the children for her input;
3. If you don't agree, you attend a mediation with a mediator, who assists you over the differences;
4. If the above does not bring agreement (a certificate of failed mediation is issued), you proceed to court asking that the parenting plan be made an order of court.

### WHAT HAS TO BE PROVED TO THE COURT?

There are a host of factors, but what

it comes down to is that the terms of your parenting plan (which includes where the children live) are in the best interests of the children. In short, that you can provide a better home for your children, one of stability, consistency, love, nurturing, and the opportunity for them to grow and develop as well-rounded persons who can not only face life's ups and downs, but productively contribute to society.

### SHOULD YOU BRIEF AN ATTORNEY?

Yes, not only should you brief an attorney, but you should brief a specialist matrimonial attorney who is preferably a member of the Family Law Forum. Divorce, matrimonial and family law have become a highly specialised area of law.

Custody disputes are bitter and emotionally draining. A competent specialist practitioner will attempt to deal with matters outside of litigation, via alternative dispute resolution mechanisms, before dragging the matter to litigation.

Even though it's a difficult fight, it's worth it.

*Shando Theron is a specialist divorce and custody lawyer, and senior partner at Theron & Theron.*